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GE 187A

U.S. Government Informal Non-Paper on the Draft Enforced Disappearances Text

In response to the Chairman's kind request for comments on the above-referenced draft text, the U.S. Mission takes pleasure in presenting the following informal comments and observations. These comments are not exhaustive, nor intended to be, but rather highlight the principal issues of greatest concern to us that are raised by the Chairman's draft text ("2003 draft").

At the outset we express appreciation to the Chairman for some very significant proposals in his text, both in terms of what is included and what is omitted. We note in particular that unlike the 1998 Sub-commission forced disappearances text, the Chair's 2003 draft eliminates problematic references to:

- prohibiting the death penalty.
- prohibiting military tribunals.
- prohibiting amnesties and pardons.
- prohibiting treaty reservations.
- requiring criminalization of "crimes against humanity."

Still, as noted above, the 2003 text contains matters of serious concern to the United States. These include, *inter alia*:

**ARTICLE ONE.** Definition of forced disappearance is far too broad ("*deprivation of a person's liberty through any means whatsoever*") and could not be a basis for a criminal offense under United States law and jurisprudence. Nor, in our view, could that definition provide an appropriate basis for a criminal offense in any country whose jurisprudence requires, as a matter of due process and fairness, that a criminal offense be defined in precise terms. Absent the requisite clarity, such vague definitions would be stricken by the courts for being too broad and vague. The definition regrettably would also cover non-State actors, which the United States firmly opposes.

A possible alternative could be the following:

"the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time."

**ARTICLE TWO.** To the extent that the paragraph requires enactment of a specific crime denominated "forced disappearance," as it appears to do, it could make the treaty unworkable under the United States system of federalism. Rather, we would support the formula contained in the Convention against Torture: to require criminalization of "acts" of torture, here "acts of forced disappearance." We fail to see why such a formulation should be regarded as being less effective or appropriate (for both federal and non-federal states) in this context when the international community has widely embraced it to suppress the heinous offense of torture.

**ARTICLE FIVE.** This provision would require a statute of limitations for disappearances that is "the longest period possible under its domestic law." In the United States this would amount to NO statute of limitations, as for instance is the case with murder in

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several state jurisdictions. To the extent such a period of prescription is considered highly disproportionate to the gravity of the offense under United States law (for example, in the case of a forced disappearance not involving torture or murder), legitimate concerns about fairness and equity would be raised, including due process challenges to the statute of limitations by the defendant.

ARTICLE SIX. Disallows an "obedience to orders" defense. As discussed during earlier negotiating rounds, certain States believe that such a defense could be appropriate in circumstances where the superior order is not manifestly unlawful.

ARTICLE SEVEN. *right of victim to receive* Severely restricts amnesties and pardons and makes them inapplicable to the receipt of compensation. During negotiations, several States wisely voiced the view that amnesties and pardons are peculiarly a matter of domestic law, especially pardons, which are typically subject to the exclusive authority of the President, Governor, or other chief executive authority.

ARTICLES NINE & ELEVEN. Requires four mandatory bases of jurisdiction, including quasi-universal ("present in") jurisdiction. This leaves little flexibility to the States Parties and may require an extra-territorial jurisdictional reach far broader than many States would be willing to exercise.

ARTICLE TWELVE (THREE). The requirement of "access [by an investigator] to all places where the disappeared person may be found" requires serious study and appears problematic under United States law, including anti-terrorism law.

ARTICLE TWELVE (FOUR) and SIXTEEN (TWO) and SEVENTEEN. Requires that information be given about a disappearance investigation to "all persons with a legitimate interest in the matter." This would appear to transgress statutes protecting the confidentiality of law enforcement methods and sources and material witness protections and may intrude upon other privacy protections in the United States.

ARTICLE FIFTEEN. *to know* Clarification would be required that these provisions for law enforcement assistance and cooperation would not require cooperation with international tribunals regarding which a State is not legally bound to cooperate.

ARTICLE NINETEEN. Requires criminalization of the failure to provide information and the like; this is a provision that would need to be made substantially more precise and targeted. *(Criminal due process issue; clarity of prohibited conduct)*

ARTICLE TWENTY-ONE. The *non-refoulement* provision needs to be made consistent with applicable standards and principles such as inclusion of the word "substantial" before "reason to believe."

These comments again are not exhaustive but do highlight some of the initial concerns of the United States raised by the 2003 draft, based on an informal translation of that text into English.

Thank you.

December 2, 2003  
Geneva